

**C.E. Wylie Construction Co. and Local Union No. 441, International Brotherhood of Electrical Workers, AFL-CIO, CLC and Sheet Metal Workers Local Union No. 420, Sheet Metal Workers International Association, AFL-CIO and Sheet Metal Workers Local Union No. 206, Sheet Metal Workers International Association, AFL-CIO.** Cases 21-CA-25857, 21-CA-25948, and 21-CA-26019

March 16, 1993

# SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS OVIATT  
AND RAUDABAUGH

On July 31, 1989, the National Labor Relations Board issued a Decision and Order<sup>1</sup> in this proceeding, finding that the Respondent violated Section 8(a)(1) of the Act by interfering with the Section 7 right of employees to have union business representatives enter the Tustin construction jobsite for the purpose of engaging in activities relevant to the representation of employees working there for subcontractors under collective-bargaining agreements.

On June 3, 1991, the United States Court of Appeals for the Ninth Circuit issued an opinion<sup>2</sup> enforcing in part and remanding in part the Board's application for enforcement of its order. In so doing, the court noted that the Respondent did not challenge the Board's finding that it committed unfair labor practices but that it contested the breadth of the Board's cease-and-desist order to the extent that the Order, inter alia, forbade the Respondent from denying jobsite access to "any other labor organization," and was not limited to the jobsite at which the unfair labor practices occurred.<sup>3</sup>

The court's remand, which the Board has accepted, directs the Board to determine (1) whether the Respondent has demonstrated a proclivity to deny jobsite access to other unions, and (2) whether there is a basis for finding that the Respondent is likely to commit violations similar to those found at the Tustin jobsite at other jobsites. In the event proclivity cannot be shown and the Board deems it unlikely that the Respondent will similarly violate the Act elsewhere, the court directs that the Order be modified by new terms confining it to the Tustin jobsite.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Having accepted the remand as the law of the case, we are bound by the court's standard for determining the breadth of the Order. For reasons described below,

we find that the Order must be limited to the Charging Party Unions and to the Tustin jobsite.<sup>4</sup>

## A. Jobsite Access to "Any Other Labor Organization"

The court cited *Communications Workers v. NLRB*, 362 U.S. 479 (1960), and subsequent Ninth Circuit decisions, for the proposition that the Board may include "any other labor organization" in an order "only when there is a showing that the NLRA violator is likely to harm others." The court held that if no proclivity to deny jobsite access to other unions is demonstrated in the trial record in this case, the Board must modify its order to delete the language "any other labor organization."

Applying this standard here, as the law of the case and noting that the factual findings made or adopted by the Board in the original proceeding evidently did not persuade the court that the Respondent had demonstrated a proclivity to deny jobsite access to other unions, we find that the record is insufficient to show such a proclivity. The Respondent had, on several occasions, denied access to representatives of two different unions who represented employees of the Respondent's subcontractors, but the unlawful denials all concerned access to the same jobsite and the same construction project. These denials, as well as hostile statements made by the Respondent's project manager in denying access, were all the subjects of specific factual findings in the decision that was before the court

<sup>4</sup> While this case was pending before the Board the Supreme Court issued its decision in *Lechmere, Inc. v. NLRB*, 112 S.Ct. 841 (1992). Following a request by the Respondent, the Board issued a notice to parties of opportunity to submit statement of position.

In its supplemental statement of position, the Respondent urges, inter alia, that the Board should reconsider its decision and order of July 31, 1989, and dismiss the complaint because of the Supreme Court's holding in *Lechmere*. In support of its position, the Respondent relies on *Dean v. TWA*, 924 F.2d 805, 810 (9th Cir. 1991); *Toussaint v. McCarthy*, 801 F.2d 1080, 1092 (9th Cir. 1986); and *NLRB v. Robin American Corp.*, 667 F.2d 1170 (5th Cir. 1982).

We note that in each of these cases relied on by the Respondent, the court was reconsidering one of its own decisions. None involved a situation, as here, where the circuit court remanded a case to the Board for a specific purpose. In order to vacate the finding of a violation, the Respondent would have to petition the court of appeals for recall of its mandate on the basis of an intervening Supreme Court decision. See *Union Nacional de Trabajadores*, 527 F.2d 602 (1st Cir. 1975).

With respect to the issue concerning which the Respondent seeks review on the merits, we invite attention to the Board's recent decision in *CDK Contracting Co.*, 308 NLRB 1117 (1992).

Finally, the General Counsel has filed a motion to strike pp. 9 and 10 of the Respondent's supplemental statement of position. The General Counsel asserts that those pages are in the nature of an answer to the General Counsel's earlier remand statement and that they are beyond the scope of the Board's above notice. The Respondent opposes the General Counsel's motion, claiming, inter alia, that the General Counsel misrepresented the record in its remand statement. We find merit in the General Counsel's motion and hereby strike pp. 9 and 10 from the Respondent's supplemental statement.

<sup>1</sup> 295 NLRB 1050.

<sup>2</sup> 934 F.2d 234 (9th Cir. 1991).

<sup>3</sup> Id. at 2541.

on review. We are unable to find any other evidence in the record bearing on this issue.

Accordingly, because we find the record insufficient, under the standard applied by the court of appeals, to establish that other unions might suffer similar denials of access at future jobsites of the Respondent, we shall modify our Order by deleting the language “any other labor organizations.”

#### *B. Scope of the Order with Respect to Jobsites*

The court’s opinion recognized that [case] precedents relating to fixed jobsites are not necessarily applicable to an employer engaged in the building and construction industry, who typically moves from place to place. It went on to hold, however, that a Board order extending to jobsites other than those where the violations at issue were found must be supported by a finding that the offending party is likely to commit similar violations at other sites.

The reasons given above for finding that the record evidence is insufficient to establish that the Respondent has a proclivity to deny jobsite access, also weigh in favor of finding that an insufficient basis exists for concluding that the Respondent is likely, at future jobsites, to engage in denials of access to union representatives similar to its unlawful denials at Tustin. As noted above, the court already had before it factual findings concerning the nature and number of the Respondent’s violations in this case. We also note in particular the absence of any evidence that the project manager who denied access was acting pursuant to instructions from a higher authority or on the basis of any centralized policy maintained by the Respondent governing jobsite access by union representatives. Nor is there evidence of any continuing dispute between the Respondent and the Unions involved here which would be likely to erupt at another site. Further the Respondent itself did not have a contractual relationship with the Unions.

In sum, applying the court of appeals’ standard, we find insufficient evidence to support a finding that the Respondent is likely to commit violations at other jobsites similar to those it committed at Tustin. Accordingly, the Order will be limited to the Tustin jobsite.

#### ORDER

The Respondent, C.E. Wylie Construction Co., San Diego, California, its officers, agents, successors, and assigns, shall

##### 1. Cease and desist from

(a) Interfering with the rights of business representatives from IBEW 441, Sheet Metal Workers Local 420, and Sheet Metal Workers Local 206, to enter the Tustin Marine Corps Air Base in Tustin, California, for the purpose of engaging in lawful union activity re-

lated to the servicing of bargaining unit members, making a safety check or otherwise policing or enforcing a collective-bargaining agreement, while the union signatory subcontractor is present and working on the jobsite; provided however, that nothing here shall prohibit Respondent from enforcing uniformly applied, reasonable rules regarding safety, working time, and security; provided further that the Unions are given clear notice of such rules.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Mail a copy of the attached notice marked “Appendix”<sup>5</sup> to each of the employees employed by the Respondent and its subcontractors at the Tustin Marine Corps Air Base in Tustin, California, in November 1987 through May 1988 and post copies of the notice at its principal place of business wherever notices to construction employees are customarily posted. Copies of the notice, on forms provided by the Regional Director for Region 21, after being signed by the Respondent’s authorized representative, shall be mailed immediately on receipt by the Respondent to all such employees at their last known address, and additional copies shall be maintained by it for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. Sufficient signed copies of the appropriate notice shall be furnished to the Regional Director for posting by Shasta Electric, F.J. Lanthier Co., the three Unions affected, and the Naval Facilities Engineering Command, if the entities are willing.

(b) Notify the Regional Director in writing within 20 days from the date of this Order what steps Respondent has taken to comply.

<sup>5</sup> If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading “Posted by Order of the National Labor Relations Board” shall read “Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.”

#### APPENDIX

##### NOTICE TO EMPLOYEES POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

- To organize
- To form, join, or assist any union
- To bargain collectively through representatives of their own choice
- To act together for other mutual aid or protection
- To choose not to engage in any of these protected concerted activities.

WE WILL NOT interfere with the rights of business representatives from IBEW Local 441, Sheet Metal Workers Local 420, and Sheet Metal Workers Local 206, to enter the Tustin Marine Corps Air Base in Tustin, California, for the purpose of engaging in lawful union activity related to the servicing of bargaining

unit members, making a safety check or otherwise policing or enforcing a collective-bargaining agreement, while the union signatory subcontractor is present and working on the jobsite; provided however, that nothing here shall prohibit us from enforcing uniformly applied, reasonable rules regarding safety, working time and security; provided further that the Unions are given clear notice of such rules.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

C.E. WYLIE CONSTRUCTION CO.